Chan Min Swee v Melawangi Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–558 OF 1999
ABDUL MALIK ISHAK J
23 MAY 2000

***Civil Procedure** — Parties — Joinder of parties — Loan agreement — Assignment of rights to assignee bank — Whether the plaintiff was entitled in law to sue the defendant without joining the assignee bank*

***Civil Procedure** — Affidavit — Affidavit in reply — Whether need to file an affidavit-in-reply if a question of law was involved — Whether filing an affidavit-in-reply a proper cause of action — Role of affidavit in reply*

***Civil Procedure** — Appearance — Unconditional appearance — Striking out — Whether the entering of an unconditional appearance would bar a person from applying to strike out the claim*

The plaintiff purchased by way of a sale and purchase agreement dated 6 February 1995 ('the SPA') an office unit. The strata title for the office unit has yet to be issued. The plaintiff, by way of a composite loan agreement and assignment ('assignment'), assigned all its rights in the SPA to Arab-Malaysian Bank Bhd ('assignee bank') as security for a loan. The assignee bank had not re-assigned the rights in the SPA to the plaintiff, but gave a letter dated 24 July 1999 to the plaintiff stating that the assignee bank did not object to the plaintiff's legal action provided the assignment was not affected. The plaintiff filed the suit for, inter alia, rescission of the SPA on the ground of, inter alia, misrepresentation and breach of contract. In encl 7, the defendant applied to strike out the plaintiff's claim under O 18 r 19(1)(b) of the Rules of the High Court ('the RHC') and under the inherent jurisdiction of the court. The senior assistant registrar ('the SAR') heard and dismissed the defendant's application with costs. The defendant filed an appeal in encl 9. The issues for determination were (i) whether the plaintiff was entitled under the law to sue the defendant without joining the assignee bank; (ii) the legal effect of the letter dated 24 July 1999; (iii) whether the defendant need to file an affidavit in reply regarding the letter dated 24 July 1999; and (iv) whether the defendant was not entitled to apply to strike out the plaintiff's claim on the ground of estoppel or waiver as the defendant had entered an unconditional appearance and filed the defence.

Held, allowing the appeal, suit stayed for six months to allow the plaintiff to include the assignee bank as a party to the action:

(1) Since both the assignor and the assignee have interests in the chose in action via the assignment, then unless both the parties were in court, the court would not be in a position to determine which party's rights have been breached — whether it was the assignor's or the assignee's or both the assignor's as well as the

assignee's rights. That being the case, the court cannot decide on the issues and even if the court were to decide, it cannot bind the party that was not in court. It would be an exercise in futility. It would appear that the prevailing authorities favoured both the assignor and the assignee bank to be made parties to the suit (see pp 120I–121C).

(2) By the letter dated 24 July 1999, the bank in effect was insisting that it had a right to enforce the assignment as an assignee. The letter could not give the plaintiff any leverage at all. By the letter the assignee bank was not waiving its rights under the assignment (see p 132A–B). The best way out to resolve the impasse would be to cite the assignee bank as a party to the suit. This would be the appropriate remedy – so that all the relevant parties would be before the court (see p 132B–C).

(3) The legal effect of the letter dated 24 July 1999 was a question of law. Indeed it was up to the respective counsel to submit on the legal effect and for the court to decide on the issue accordingly. It would certainly not be a proper course of action for the defendant to undertake by filing an affidavit to dispute the legal effect of a document since the role of an affidavit is limited to the purpose of deposing to a state of facts and not in regard to a question of law (See p131D–E).

(4) If a party is interested to strike out a writ and the statement of claim on other grounds other than that the writ or service is irregular or for want of jurisdiction, the party can enter an unconditional appearance because the effect of an unconditional appearance (be it for defective writ or for defective service thereof or for want of jurisdiction) will not be relevant to the main ground for the striking out application (see pp142I–143A).

Notes

For cases on joinder of parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3296–3321.

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 214–222.

For cases on unconditional appearance, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 382–385.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 1890 (refd)

'Avro International'; 'The Avro Venture'; 'Avro International' (Owners of), The v Arabian Marine Bunkers Sales Co Ltd & Anor [1988] 1 MLJ 147 (refd)

Bank Bumiputra (M) Bhd & Anor v Lorrain Esme Osman and another action [1987] 2 MLJ 633 (refd)

A *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 (refd)

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal [1995] 3 MLJ 472 (refd)

Durham Brothers v Robertson (1898) 1 QB 765, 769, 770 (refd)

B *EG Tan & Co (Pte) (in liquidation) v Tan Chong San* [1993] 1 MLJ 256 (refd)

Hoo See Sen & Anor v Public Bank Bhd & Anor [1988] 2 MLJ 170 (refd)

Hughes v Pump House Hotel Co Ltd (1902) 2 KB 190 (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)

C *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804 (refd)

Malayan Banking Bhd v Lim Tee Yong & Ors [1994] 3 MLJ 715 (refd)

Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

D *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (refd)

Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd [1999] 4 CLJ 205 (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309 (refd)

E *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590 (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)

Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 CLJ 211 (refd)

F *Tancred & Ors v Delagoa Bay & East Africa Railway Co* (1889) 23 QBD 23 (refd)

Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (refd)

Tengku Jaafar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156 (refd)

G *Three Rivers District Council & Ors v Governor & Company of The Bank of England* [1996] QB 292 (refd)

Walter & Sullivan Bhd v J Murphy & Sons Bhd; Same v Same [1955] 2 WLR 919 (refd)

William Brandt's Sons & Co v Dunlop Rubber Co Limited (1905) AC 454 (refd)

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Legislation referred to

Banking and Financial Institutions Act 1989
Civil Law Act 1956 s 4(3)
Judicature Act 1873 [Eng] s 25(6)
I Law of Real Property Act 1925 [Eng] s 136
Real Property Gains Tax Act 1976
Rules of the High Court 1980 O 6 r 3(1)(a), O 18 r 19(1)(b)

Soo San San (*Paul Ong & Associates*) for the plaintiff.
Ahmad Moosdeen (*Chan, Moosdeen & Partners*) for the defendant.

Abdul Malik Ishak J: In encl 7, the defendant applied on 7 December 1999 to strike out the plaintiff's claim under O 18 r 19(1)(b) of the Rules of the High Court 1980 ('the RHC') — on the ground that it was scandalous, frivolous or vexatious, and also under the inherent jurisdiction of the court. The application was supported by an affidavit of Tan Boon Chuan that was affirmed on 17 November 1999 as reflected in encl 6. The naturally opposed the application and through Chan Min Swee affirmed an affidavit in reply on 8 December 1999 as seen in encl 8. On 15 February 2000, the senior assistant registrar ('the SAR') heard the defendant's application in encl 7 and dismissed it with costs. Being aggrieved, the defendant appealed to the judge in chambers on 16 February 2000 which was also filed on the same date and this can be seen in encl 9.

The undisputed facts

Within a short compass, the facts may be narrated as follows. The plaintiff purchased by way of a sale and purchase agreement dated 6 February 1995 ('SPA') an office unit no: Deluxe D, level 9, measuring 1,765 square feet at the price of RM688,350.00 known as the PJ Tower from the defendant. That SPA has been exhibited as exh 'T-1' of encl 6. To date, the strata title for the office unit has yet to be issued. The plaintiff, by way of a composite loan agreement and assignment dated 10 July 1995 ('Assignment'), assigned all its rights in the SPA to Arab-Malaysian Bank Bhd ('assignee bank') as security for a loan. A copy of that Assignment was exhibited and marked as exhibit 'T-2' as seen in encl 6. It would be interesting to note, that to date, the assignee bank has not re-assigned the rights in the SPA to the plaintiff, for an obvious reason — that the loan has not been repaid.

On 6 August 1999, the plaintiff filed the writ of summons together with the statement of claim as seen in encl 1 for, inter alia, rescission of the SPA on the ground of, inter alia, misrepresentation and breach of contract. The assignee bank was quite magnanimous and gave a letter dated 24 July 1999 to the plaintiff stating that the assignee bank did not object to the plaintiff's legal action provided the Assignment was not affected. A copy of that letter can be seen in encl 8 and it was exhibited as exhibit 'A'. The letter was worded thus:

> Arab-Malaysian Bank Berhad
> Date: 24 July, 1999
> Chan Min Swee
> 1007, Block B,
> Phileo Damansara,
> Jalan 16/11
> 43350 Petaling Jaya
> Selangor Darul Ehsan.
>
> Dear Sir,

Re: Consent to Legal Action/Claims for Breach of Terms/Conditions in Sale and Purchase Agreement

Property: Unit Deluxe D, Level 9, Phileo Damansara.

Purchasers: Chan Min Swee, Ning Ah Moi & Lim Ah Moi

Borrowers: Chan Min Swee, Ning Ah Moi & Lim Ah Moi

We make reference to your letter dated 3 March 1999.

We Arab-Malaysian Bank Berhad (295576-U) a company incorporated in Malaysia, with its registered office at 22nd Floor, Bangunan Arab Malaysian, 55 Jalan Chulan, 50200 Kuala Lumpur and its place of business at 11th Floor, Menara Maxisegar, Jalan Pandan Indah 4/2, Pandan Indah, 55100 Kuala Lumpur the end-financier for the abovementioned property have no objection in allowing your goodself to seek legal recourse/damage against the Developer for breach of (the) terms and conditions of the Sale and Purchase Agreement.

This consent is subject to the Bank's rights, interest, claims under the Composite Loan Agreement cum Assignment dated 6 June 1995 between AMBB and the Borrowers/Purchasers remaining intact.

Thank you.

Yours faithfully, for ARAB-MALAYSIAN BANK BHD
Sgd Illegible

Mohd Noor Yahya
Manager-Retail Banking Dept
c.c. Legal Manager

Issue

The defendant's application in encl 7 to strike out the plaintiff's claim interestingly raised one legal issue. It was said that the assignment was a conditional assignment. This meant that the plaintiff had no legal right to sue the defendant without joining the assignee bank. Bluntly put, was the plaintiff entitled under the law to sue the defendant without joining the assignee bank?

Observations

The issue entailed the construction of the Assignment document. It also involved the ramifications of the law on assignment.

The defendants in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 (CA) applied to strike out the plaintiff's claim under O 18 r 19 of the RHC. On appeal, the Court of Appeal allowed the defendant's application on the ground that the plaintiff's claim was based on the interpretation of certain arguments and the law applicable to the documents showed that there was no legal basis for the claim. Siti Norma Yaakob JCA delivering the judgment of the Court of Appeal had this to say at pp 320–321 of the report:

> The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the court is a drastic power which should

> only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1). Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890). A B
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> When a question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question. (See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence. C

In the same case, Siti Norma Yaakob JCA applied the case of *McKay* — a decision of the English Court of Appeal. In *McKay*, the English Court of Appeal without hesitation struck out part of the plaintiff's claim on the ground that it had no valid legal basis whatsoever. In the words of Stephenson LJ at p 778 of the report: D

> In my judgment the power is a discretionary power. The word 'may' in O 18 r 19(1) does not mean 'must'. But a defendant has a prima facie right to be relieved of having to meet a claim which discloses no reasonable cause of action, and, if he can succeed in showing that a claim must fail, he ought not to be denied that relief simply because he still has to meet other claims by the plaintiff or unless there are strong reasons for allowing the bad claim to go to trial. E

Ackner LJ delivering a separate judgment in *McKay* had this to say at p 785 of the report: F

> I respectfully agree with the observation of *Sir Gordon Willmer in Drummond-Jack v British Medical Association* [1970] 1 All ER 1094 at 1105, [1970] 1 WLR 688 at 700, where he said:
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> > 'The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can be but one result.' G

The illuminating words of these judges must be vigorously applied to the factual matrix of the present appeal in encl 9. The ideas of these brilliant judges must be read and adopted vigorously so as to give life to the facts of the present appeal in order to develop the common law in a sure and steady way. No judge in the world can patent his legal ideas especially when those legal ideas usually come from fellow judges, be it young or old, and from renowned text book writers. H

What is the law on absolute assignment? I

The relevant statutory provision would be s 4(3) of the Civil Law Act 1956 which enacts as follows:

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> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

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C The Federal Court in the case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 had occasion to interpret s 4(3) of the Civil Law Act 1956. There the Federal Court held that if an assignment was absolute and not purporting to be by way of a charge within the ambit and purport of s 4(3) of the Civil Law Act 1956, then only the assignee was entitled to sue. The assignor was said not to have the right to sue as he had given all his rights to the assignee. D

The facts of *Nouvau Mont Dor (M) Sdn Bhd* may be stated as follows. In that case, the appellant purchased a shop office unit in a complex from the developer and then assigned all the rights in the sale and purchase agreement to the Public Bank for a loan. The developer meanwhile sold the whole complex to the respondent. E When the appellant sued the respondent for certain declaratory reliefs the respondent raised a preliminary point to the effect that the appellant had no right to sue as it had assigned all its rights to the Public Bank who was the only one entitled to sue. The Federal Court agreed with the preliminary point and held that the terms of the assignment showed it was an absolute assignment and not purporting to be F by way of a charge and therefore the Federal Court held that the appellant had no more right to sue. Only the Public Bank could sue, so held the Federal Court.

It is germane to note that in the *Nouvau Mont Dor*'s case, the appellant assigned all the rights in the sale and purchase agreement to the Public Bank G as security for a loan. The Federal Court held that such an assignment was absolute and not by way of a charge even though the assignment was by way of a security for a loan. In short, it can be surmised that one may have an absolute assignment even if the assignment is a security for a loan.

The Federal Court in the *Nouvau Mont Dor*'s case also observed that:

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(i) the wordings of s 4(3) of the Civil Law Act 1956 was similar to the English s 25(6) of the Judicature Act 1873 which had since been replaced by the English s 136 of the Law of Real Property Act 1925.

(ii) the English authorities on the interpretation of the English s 136 of the Law of Real Property Act 1925 served as guidelines to interpret s 4(3) of the Civil Law Act 1956. I

(iii) three English cases concerning assignments given as securities for loans were referred to and these cases showed that there can be an

> absolute assignment even for such securities: *Durham Brothers v Robertson* (1898) 1 QB 765, 769, 770; *Hughes v Pump House Hotel Co Ltd* (1902) 2 KB 190; and *Walter & Sullivan Bhd v J Murphy & Sons Bhd; Same v Same* [1955] 2 WLR 919. A

Chitty LJ in *Durham Brothers v Robertson* at pp 771–772 of the report said:

> As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred & Ors v Delagoa Bay and East Africa Railway* 23 QBD 239 there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National Provincial Bank v Harle* (1881) 6 QBD 626, that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute: it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment. B C D E

But Mr Ahmad Moosdeen, learned counsel for the defendant, was very careful. He said that he would not submit that the Assignment in exh 'T-2' of encl 6 was an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956. He then drew my attention to s 9.01 of the assignment which reads as follows: F

> Assignment
>
> In consideration of the Loan the borrower(s) hereby absolutely ASSIGN(S) to the Lender the full and entire benefit of the Sale and Purchase Agreement to the property together with all rights and interests of the Borrower(s) therein. Notwithstanding this Assignment or any other provisions of this Instrument the Borrower(s) shall and hereby undertakes to pay all and any balance of the purchase monies or other money payable under the provision of the Sale and Purchase Agreement and to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower(s) expressed and contained. G

and he also laid emphasis on s 9.05 of the assignment which reads as follows: H

> Assignment to Remain in Force
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> The Assignment herein shall remain in force until the said charge referred to in s 3.04.1 hereof is duly registered against the Property or the whole of the monies secured by the Property together with interest thereon and all the other monies payable to the Lender hereunder are paid in full whichever first happens but without prejudice to the Lender's rights and remedies against the Borrower(s) in respect of any antecedent claims or breach of covenant. I

Mr Ahmad Moosdeen also referred to the case of *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620, a decision of Augusine Paul JC (now Judge). In that case the assignee bank (not the assignor) sued the defendant debtor. The defendant submitted that the assignee bank could not sue as the assignment was not absolute. The judicial commissioner reviewed the law on assignment in some detail and held that the assignment before him was not an absolute assignment because of the existence of a clause in the assignment which was similar to s 9.05 of the Assignment. At p 636 of the report, the judicial commissioner said:

> To my mind, the answer to the problem lies in cl 1 of the assignment which, at the risk of repetition, reads as follows:
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> > 'In consideration of the bank granting the loan to the assignor, receipt of which sum the assignor hereby acknowledges, the assignor hereby absolutely assigns to the bank the balance of the contract sum to hold the same into the bank absolutely *until the full amount of the loan and all interest thereon shall be fully paid and satisfied.*' (Emphasis added.)
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> This clause is similar to the one found in *Durham Brothers v Robertson* [1898] 1 QB 765 to which I have referred in some detail in an earlier part of the judgment. The words that I have emphasized in cl 1 show that the assignment is to continue only till the full repayment of the loan and interest. On repayment of the loan and interest, the assignment comes to an end. The repayment of the loan advanced is an uncertain event and makes the assignment conditional. This would involve the defendant in the state of the accounts between the plaintiff and the assignor. Accordingly, it is my view that the assignment is not absolute. In this instance, therefore, the use of the word 'absolutely' in cl 1 does not render the assignment absolute. This finding, as agreed to by both parties, is sufficient to make a determination in this appeal. In the upshot, I dismiss the appeal with costs.

It is interesting to note that in the *Durham Brothers v Robertson*, the court there held that the assignment was not absolute. The relevant portion of the assignment in that case was worded as follows (see p 769 of the report):

> Re Building Contract of Middle Class Dwellings, situate on the west side South Lambeth Road, SW — In consideration of money advanced from time to time we hereby charge the sum of 1080*l*, being the agreed price for the sale of 60*l*, per annum ground-rent which will become due to us from John Robertson, Esq, of No 73, Rosendale Road, West Dulwich, on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you.

Taking advantage of these two cases, namely:

(1) *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd*; and

(2) *Durham Brothers v Robertson*, Mr Ahmad Moosdeen submitted that s 9.05 of the Assignment was similarly worded with the assignments in these two cases and he said that in the context of the present appeal in encl 9, he would not submit that the Assignment was absolute. However, he ingeniously argued that he reserved the right to submit

otherwise in any other applications in the near future or for that matter in the course of the trial. Indeed that was shrewdness at its peak. A

If the Assignment was not absolute, can the plaintiff as the assignor sue alone?

Mr Ahmad Moosdeen submitted that the plaintiff could not sue alone and the plaintiff must cite the assignee bank as a party to the legal action. On the B other end of the scale, Mr Soo San San, learned counsel for the defendant, submitted that if the court were to rule that this was an absolute assignment then the plaintiff had the locus standi to commence legal action against the defendant because the assignee bank had been duly informed of the legal action instituted by the plaintiff and had agreed to it by letter dated 24 July 1999 which had been reproduced in the early part of this judgment. In C short, it was the submission of Mr Soo San San that the assignee bank need not be joined as a party to this action and that the action commenced by the plaintiff alone was valid and enforceable.

Two divergent views were advanced by the parties. It is now up to me to decide. For this exercise, I must examine the law in its correct D perspective.

Cheshire and Fifoot's Law of Contract, (10th Ed, 1981) at p 459 contained passages which should be reproduced and they were worded in this fashion:

> (b) Non-absolute assignment of equitable chose: assignor must be a party to E an action. The non-absolute assignment of an equitable chose in action does not entitle the assignee to sue in his own name, but requires him to join the assignor as a party. This joinder of the assignor is necessary on practical grounds, for in every case where an assignment is not absolute, as, for instance, where it is conditional or by way of charge, the state of accounts between the parties is the critical factor. The debtor occupies F the position of a stakeholder who is willing to pay the person rightfully entitled, but as neither he nor the court knows what the exact rights of the parties are it is essential that the assignor should be a party to the action in order that his interest may be bound. Again, if an assignment affects part only of the assignor's intesrest, the court cannot adjudicate finally without the presence of both parties.
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> > G 'The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt. *Re Steel Wing Co* [1921] 1 Ch 349 at 357, per P O Lawrence J.'
>
> By the same reasoning the assignor cannot recover the amount remaining due to him from the debtor without joining the assignee as a party to the action. H *Walter and Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 843.

and the thrust of these passages may be stated in this way. That since both the assignor and the assignee have interests in the chose in action via the assignment, then unless both the parties were in court, the court would not be in a position to determine which party's rights have been breached — I whether it was the assignor's or the assignee's or both the assignor's as well as the assignee's rights. Surely, these were crucial issues to be adjudicated

A upon. That being the case, the court cannot decide on the issues and even if the court were to decide, it cannot bind the party that was not in court. It would be an exercise in futility. These reasonings would equally apply to the present appeal. The plaintiff in the present appeal as an assignor claimed that his rights under the SPA have been breached by the defendant. Since the plaintiff has assigned the Assignment to the assignee bank, then the B assignee bank too has rights in and under the SPA. How could the court know, whose rights have been breached — whether it was the plaintiff as the assignor or the bank as the assignee? If the court were to decide one way or the other, can the assignee bank who was not cited as a party and who was not in court be bound by it? The matter was accentuated further if the C assignee bank were to hold different views on the subject matter at hand. It would appear that the prevailing authorities favoured both the assignor and the assignee bank to be made parties to the suit. Thus, *Anson's Law of Contract*, (27th Ed) by J Beatson, QC at p 453 held the view that:

> If the chose in action is equitable, the assignee is normally entitled to sue without joining the assignor as a party. The exception is where the assignor D still has some interest in the suit. This may arise where there is still some question of accounts outstanding between the assignor and the assignee, or where the assignment consists of a charge upon a trust fund. In such a case the parties interested must be made parties to the action so that the court may make a final adjudication binding them all.
>
> E If the chose in action is legal, the assignee cannot recover damages or other relief without joining the assignor as a party to the action, if the assignor is willing as co-plaintiff, if not, as co-defendant. *Durham Brothers v Robertson* [1898] 1 QB 765, at p 769; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1; *Williams v Atlantic Assurance Co* [1933] 1 KB 81; *Central Insurance Co Ltd v Seacalf SS Cpn* [1983] 2 Lloyd's Rep 25; *Weddell v J A Pearce & Major* [1988] Ch 26; *Three Rivers DC v Bank of England* [1996] F QB 292. *Cf. Brandt's Sons & Co v Rubber Co Ltd* (supra, n 34), at p 464. Moreover the assignor of part of a debt cannot recover the balance in excess of the sum assigned without joining the assignee. *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 1 QB 584. Attempts have been made to justify these requirements on the ground that they serve to protect the debtor who might otherwise pay the debt to the wrong person, Ibid, per Parker LJ at p 588 G and that they allow an assignor who wishes to dispute the assignment to do so. *Durham Brothers v Robertson* (supra, n 36), per Chitty LJ at p 770.But the first of these reasons is only relevant where the assignor retains an interest in the chose, and the second would apply even in the case of a statutory assignment, where the assignee is entitled to sue alone. The rule that an assignor of a legal chose must always be joined as a party seems to be a procedural consequence of the fact that the legal title to the chose assigned does not pass to the H assignee, but only an equitable right, the legal title remaining vested in the assignor. *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430; *Three Rivers DC v Bank of England* [1996] QB 292.

GH Treitel in the *Law of Contract*, (8th Ed) at p 581 had this to say:

> I Hence it is necessary, for the protection of the debtor, to have all the interested parties before the court. For the same reason, an assignor of part of a debt cannot sue for the part he retains without joining the assignee as a party to the action. *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584.

Further down the same page of the same book, the learned author in serious vein said:

> Section 136(1) of the Law of Property Act 1925, contrasts absolute assignments with assignments by way of charge; but some judgments also distinguish between absolute and conditional assignments eg *Durham Bros v Robertson* [1898] 1 QB 765, 773; cf *The Balder London* [1980] 2 Lloyd's Rep 489, 495. Many assignments by way of charge are, in fact, assignments subject to the condition subsequent that they will determine when the assignor pays off the debt which he owes to the assignee. Assignments which are subject to some other condition (whether precedent or subsequent) should be treated in the same way eg *The Halcyon The Great* [1984] 1 Lloyd's Rep 283. Whatever the condition may be, the assignor retains a contingent interest in the debt, and is thus a desirable party to an action to recover it. Suppose that A assigns rent due under a lease 'to my daughter until she marries.' The assignment should not be absolute since it is desirable that A should be a party to an action brought by his daughter against the tenant for rent. If the daughter could sue without A, she might be able to prove that she was unmarried, and so entitled to the rent. But this would not prevent A, in a subsequent action against the tenant, from proving that the court in the first action had made a mistake in finding that the daughter was unmarried, so that the tenant would have to pay over again. What matters to the tenant is not whether the daughter is married but that the question should be decided, one way or the other, so as to bind both A and the daughter. Cf *The Aiolos* [1983] 2 Lloyd's Rep 25, 33.

GH Treitel in his book gave an example of an assignee daughter who sued without joining the assignor. The same reasoning would equally apply to the situation where the assignor sues without joining the assignee daughter — just like the present appeal where the plaintiff as the assignor sued the defendant without joining the assignee bank. Whatever the situation would be, the problem would still be the same. The decision of the court would not bind the other party who was not cited as a party to the legal proceeding. It was to prevent this possibility and the consequential possibility of conflicting decisions that the matter should be adjudicated in one action. In the example cited by GH Treitel as alluded to above, if the daughter proved, in one action, that she was married and, in the other action, it was proved that the daughter was not married — two separate factual situations, then the court would insist that both the assignor and the assignee be made parties to the legal action in order to bind both of them.

Reference should also be made to *Chitty On Contracts*, (27th Ed) Vol 1, particularly at p 969 thereof where the learned author outlined the law in these words:

> After the passing of the Judicature Act, it was held that, although assignments of legal choses not complying with the statute remained valid in equity, *Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454, it also remained the position that both assignor and assignee should normally be made parties to the proceedings; and see also *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1; *Williams v Atlantic Assurance Co* [1933] 1 KB 81; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, 5; *Walter and Sullivan Ltd v Murphy & Sons Ltd* [1955] 2 QB 584 (assignor wishing to sue must join assignee); *The Aiolos* [1983] 2 Lloyd's Rep 25; *Weddell v JA Pearce & Major*

> [1988] Ch 26. Where the assignment fails to be statutory because the assignor has not wholly disposed of his interest (eg where it is by way of charge only, or is of part of a debt only), or where there is a dispute as to whether the documents constitute an assignment, *The Aiolos*, this rule serves a useful purpose. It ensures that all parties with an interest in the chose are brought before the court and that the debtor, if he is adjudged liable, obtains a complete discharge from his liability. But where the assignor retains no interest in the chose in action and the assignment only fails to be statutory, eg because it was not in writing or because no notice has been given, the requirement that the assignor be made a party to the proceedings seems to serve no useful purpose and may be dispensed with. *The Aiolos* [1983] 2 Lloyd's Rep 25, 33-34; *Weddell v JA Pearce & Major* [1988] Ch 26, 40-41.

It must be recalled that in *Durham Brothers v Robertson*, the assignees sued the debtor without joining the assignor. The English Court of Appeal held that the assignment was not absolute and therefore the assignor must be made a party to the legal action because any order made by the court would otherwise not be binding on the assignor and the upshot of it was that the action was dismissed. In the words of Chitty LJ at p 774 of the report:

> In the absence of Smith & Co the amount due from them to the plaintiffs cannot be ascertained. An account taken in this action of the advances would not bind Smith & Co.

These words were said in the context of a case that concerned an assignee suing alone, but the reasoning behind it was perfectly sound and should likewise be applied to the situation where the assignor sued alone, like the present appeal, after all the finding of the court will not bind the assignee bank who was not a party to the action.

Reverting back to the case of *Walter & Sullivan Ltd v J Murphy & Sons Ltd; Same v Same* which was alluded to earlier, I must say that that case bore a striking resemblance to the facts of the present case. That was a case where the assignor sued without the assignee, just like the present appeal. In that case the plaintiff who was the assignor assigned part of the debt to Hall & Co The plaintiff then sued the defendant debtor for the part not assigned without citing the assignee as a party to the action. The English Court of Appeal did not hesitate and proceeded to strike out the plaintiff's claim on the ground that the assignee was a necessary party to the action. Parker LJ writing for the English Court of Appeal at p 845 had this to say:

> Normally, of course, it is the assignee who, if necessary, seeks to recover the debt, and in a case where, as here, s 136 of the Law of Property Act, 1925, does not apply, he would, if the right assigned were equitable, have to join the assignor in order to bind him at law, or if the right were a legal right he could compel the assignor to allow his name to be used. In the present case, however, it is the assignor who is seeking to recover, and in his own right, and it is strongly urged that he is entitled to do so without joining the assignee. We think that that is an impossible contention. The whole object of the notice to the debtor is to protect the assignee. After receipt of that notice the debtor pays the assignor at his peril.

Further down the same page of the same judgment, his Lordship continued:

> It was further said that once the plaintiffs in the present proceedings recovered judgment the debt would merge in the judgment debt, and that accordingly the defendants could not thereafter be sued by Hall & Co. The court, however, will not give judgment for the plaintiffs when there is an admitted interest outstanding in Hall & Co, and unless and until the authority to pay Hall & Co is withdrawn, or Hall & Co are joined in the proceedings, judgment cannot be given. Further, in the present case, the assignment is only of part of a debt, and that being so, the plaintiffs cannot recover even the excess, if any, over the part assigned without bringing Hall & Co before the court (see *Re Steel Wing Co Ltd* [1921] 1 Ch 349; 124 LT 664; sub nom *Re Steel Ring Co, Lord's Petition,* 90 LJ Ch 116; 10 Digest 821, 5346). We are of opinion, therefore, that the appeal should be dismissed.
>
> It remains only to consider the defendants' cross-appeal, which is an appeal from the official referee's order merely staying the proceedings. In our opinion the defendants are entitled to an order dismissing the claim, unless within a fixed period the claim is put in proper form. This could take the form of the plaintiffs' joining Hall & Co as plaintiffs, should they be willing to join, or as defendants, should they not be willing. Alternatively, the plaintiffs might be able to induce Hall & Co to consent to the authority to pay being withdrawn, substituting some letter of trust under which the plaintiffs undertook to hold any sum recovered in the proceedings in trust for Hall & Co

It is interesting to note that although the case of *Walter & Sullivan, Ltd v J Murphy & Sons Ltd Same v Same* was decided in 1955, yet it received a fresh endorsement in 1996 by way of the case of *Three Rivers District Council & Ors v Governor & Company of The Bank of England* [1996] QB 292, a decision of the English Court of Appeal. Simply put, that was a case where the assignors tried to sue on an equitable assignment without making the assignee a party. The English Court of Appeal dutifully followed *Walter & Sullivan* and stayed the proceedings. The English Court of Appeal refused to allow the plaintiffs to proceed unless they amended their claim and made the assignee a party. Staughton LJ delivering a separate judgment had this to say at p 298 of the report:

> The issue is, whether the assignor of a chose in action retains a cause of action, when the assignment is equitable. All are agreed that, as a procedural requirement, he may if the court thinks fit be compelled to join the assignee as a party; so too an equitable assignee who sues alone may be required to join the assignor. In either case the effect is to avoid double jeopardy, to save the debtor from the risk that he may have to pay twice.

and at p 299 of the report, Staughton LJ continued to say:

> We have not been referred to any example of the converse case, where an assignor successfully sued alone, save in the class of case where the assignee was using the assignor's name. I shall return to that class shortly. A modern case where an assignor tried to sue alone, but was obliged to join the assignee, was *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584.

It is germane to note that both *Walter & Sullivan* together with the *Three Rivers District Council* stood on the same footing as the present appeal. In both these cases, the assignors ventured on their own. They tried to sue

A alone without the assignees and the English Court of Appeal frowned at this attempt and did not allow them to do so. In the present appeal, the plaintiff took the same course of action and I am urged to disallow it.

The Federal Court in *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC) had occasion to decide whether an assignment was B absolute and unconditional. That was a case where the beneficiary assignor of an estate sold and assigned her share in the estate to the plaintiff assignee. A dispute soon arose between the assignor and the other beneficiaries of the estate. Fortunately, the beneficiaries settled their disputes and the settlement was recorded in a consent order of the court. But there was one snag. That consent order of the court did not take into account the plaintiff C assignee's interest. The plaintiff sued and was defeated at the High Court level. On appeal, the Federal Court allowed the appeal and held that the assignment to the plaintiff was absolute and the consent order was set aside to the extent it affected the plaintiff because the plaintiff was not a party to the settlement and the consent order. His Lordship Peh Swee Chin FCJ delivering the judgment of the Federal Court laid down the law in these D salient words (see pp 775–776 of the report):

> The learned judge appears to be in error in suggesting as if there were two different distinct kinds of assignment, ie one in equity and one under s 4(3) of the Civil Law Act 1956, both assignments being mutually exclusive. Nothing is further from the truth. If an assignment is valid in law or legal (ie legally E binding on the assignor), then it is valid or legal and compliance with s 4(3) is not essential to make it valid or legal as stated. Section 4(3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant. It is instructive to read the observation F and conclusion of Prof Furmston in *Cheshire, Fifoot & Furmston, Law of Contract* (1987, 11th Ed) at p 498 in regard to s 136 of England's Law of Property Act 1925 which is in pari material with our s 4(3): 'The statute has not altered the law in substance. It is merely machinery. It does not confer a right of action which did not exist before but enables the right of action that has always existed to be pursued in a less roundabout fashion'.

G I understood this passage to mean:

(a) if the assignment was within the terms of s 4(3) of the Civil Law Act 1956 in that it was an absolute assignment made by the assignor in writing and notice of which has been given to the debtor, then the assignee can sue alone and independently without the assignor and the H assignor too cannot sue;

(b) but if the assignment was not within the terms of s 4(3) of the Civil Law Act 1956, then the court has to resort to the common law position because s 4(3) of the Civil Law Act 1956 has not changed the law and the law remained as per (a) above; I

(c) the Federal Court was of the view that in such a case the assignee must join the assignor either as plaintiff or as a defendant; and

(d) in the context of the common law, where the situation would be the other way round in the sense that it was the assignor suing, then the assignor must joint the assignee because the reasoning for the first situation when the assignee was suing must equally apply to the second situation where the assignor was suing. A

Going into the crux of the matter, his Lordship Peh Swee Chin FCJ said at p 783 of the report: B

> It is elementary that the first requisite of a contract is that the parties should have reached agreement which would involve an offer and acceptance of the offer, inter alia. The assignee had never reached such agreement with all the parties to the family settlement agreement and the family settlement agreement purported to dispose of his beneficial interest without his knowledge and consent. Thus, not only that the settlement agreement is not binding on the assignee because he was not a party to it, but it also attempted to dispose of his interest by the agreement, to be backed by the sanctity of a consent order of the court too. A situation of grave injustice was thus caused to the assignee by the family settlement agreement and based on it, the consent order which was sought to be set aside. C D

and at p 784 of the report, his Lordship continued:

> We therefore propose that the family settlement agreement and the consent order ought to be set aside except for a serious impediment to such proposed course of action which will be presently dealt with.
>
> The impediment is that, pursuant to the consent order, Tan Chong had bought and had itself registered as a proprietor of one of the four pieces of land, albeit in highly controversial circumstances and the said consent order, if set aside, would cause prejudice to Tan Chong when Tan Chong was entitled to and did accept the terms of the consent order without question as after all, even though a consent order is an order of court carrying out an agreement between the parties, it has become a command from a court of competent jurisdiction which should either be respected or obeyed. E F

Consequently, his Lordship set aside the consent order save in regard to that part of the order which granted leave to sell the fourth piece of land. Applying the principles enunciated by his Lordship it can safely be said that if the assignee bank was not made a party to the present appeal, then the assignee bank cannot be bound by any order made by this court. Whatever order that this court may make that affects the assignee bank's interest, the assignee bank can surely apply to set aside that order. G

The common law position would be clearer. It can broadly be stated as follows. If the assignment was not absolute, then the assignee bank cannot sue without joining the assignor: *Khaw Poh Chhuan v Ng Gaik Peng & Ors*; *Durham Brothers v Robertson*; *Hughes v Pump House Hotel Co Ltd*; and *William Brandt's Sons & Co v Dunlop Rubber Co Limited* [1905] AC 454. In similar vein, the converse would also be true. The assignor cannot sue without joining the assignee bank: *Walter & Sullivan, Ltd v J Murphy & Sons Ltd Same v Same*; and the *Three Rivers District Council & Ors v Governor & Company of The Bank of England*; together with the textbook writers referred to earlier. The following salient reasons may be advanced for these broad minded approaches: H I

(i) Both the parties — namely, the assignor and the assignee bank have equal rights in an assignment and that kind of assignment was not absolute. The court would be placed in a dilemma; not knowing the exact rights of each party unless both parties were before the court.

(ii) In a situation where the court makes a decision in the absence of the other party, be it the assignor or the assignee bank, then the decision cannot bind the other party who was absent and who was not cited as a party.

(iii) This meant that the absent party who was not involved nor cited as a party may sue again and may even set aside the order of the court which affected him. This would give rise to conflicting decisions and the debtor will be placed in double jeopardy.

(iv) The above reasons would be vigorously applied notwithstanding whether the assignor or the assignee bank was suing. In short, the other party must always be made a party to the legal action.

Mr Soo San San argued that the assignment was not absolute. He relied and laid emphasis on s 9.01 of the assignment which had been reproduced earlier and submitted that the court still has the duty to look at the wordings of the loan agreement as seen in exh 'T-2' of encl 6 in order to determine whether the loan agreement was meant to be an absolute assignment. It was the argument of Mr Soo San San that the assignment in the present appeal was by way of a charge and, therefore, it cannot be an absolute assignment. My attention was drawn to the case of *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd* [1999] 4 CLJ 205 where the Ipoh High Court rejected a similar application by the defendant to strike out the plaintiff's claim on the ground of lack of locus standi. The issue which had to be adjudicated upon by the Ipoh High Court was whether the assignment of the property to the bank was an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956. The Ipoh High Court, after perusing all the relevant documents, concluded that the assignment was intended to be by way of a charge only. The judicial commissioner at p 212 of the report rounded up the matter in these words:

> In my judgment, the fact that the Loan cum Assignment is entered into by way of security for a loan would not by itself prevent it from being absolute, but when that fact is considered together with other facts and clauses in the instrument as identified below, the combined effect is that it does show that the assignment is intended by way of charge only.

I will now proceed to examine the case of *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd* which was heavily relied upon by the plaintiff in the present appeal. In that case, the plaintiffs purchased an industrial lot from the defendant developer and assigned the sale and purchase agreement to a bank as security for a loan. The plaintiffs then sued the defendant for damages for late delivery. The defendant retorted that the plaintiffs had no locus standi to sue in view of the assignment. The magistrate upheld the objection but on appeal to the High Court, the judicial commissioner held that the plaintiffs had a right to sue as the assignment was not absolute. The judicial commissioner discussed in great detail the issue of whether the assignment was absolute and he held that it was not. At p 214 of the report, the judicial commissioner said:

> For the reasons given above, I conclude by saying that in my judgment, the assignment in this case is not an absolute one. The applicants were not deprived of competency to bring this action in their own name. I accordingly allow this appeal with costs and set aside the order of the learned magistrate.

With respect, the judicial commissioner assumed that there was only one possibility in that if the assignment was not absolute then the assignor can sue. It gave no reason for this assumption and cited no authority for this assumption. It did not consider the other possibility and this possibility was this: assuming the assignment was not absolute, can the assignor sue alone and independently or must the assignor make the assignee a party. The cases of *Khaw Poh Chhuan v Ng Gaik Peng & Ors*; *Walter & Sullivan Ltd v J Murphy & Sons Ltd Same v Same*; and the *Three Rivers District Council & Ors v Governor & Company of The Bank of England* — which were reported by then and were certainly available were not brought to be attention of the Judicial Commissioner when he adjudicated the case of *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd.* Had these cases together with the relevant passages of the textbook writers which were alluded to in the early part of this judgment were brought to his attention, the outcome may be different. In my judgment, the case of *Pak Ki Yau* was decided per incuriam and being a decision of coordinate jurisdiction, it was not binding on me. I preferred the decision of the Federal Court in *Khaw Poh Chhuan v Ng Gaik Peng & Ors* as it decided the matter soundly and, moreover, I am bound by that decision.

The next Malaysian case to be considered would be that of *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804, a decision of the Kota Kinabalu High Court. In that case, the plaintiffs purchased houses from the defendant developer. There were no individual titles for the houses and when the plaintiffs obtained loans from various financial institutions, they immediately assigned their sale and purchase agreements to the financial institutions. The plaintiffs wasted no time and they sued the defendant developer for failure to complete their houses within time and also sought for other reliefs. The defendant developer was alert and they raised a preliminary objection to the effect that the plaintiffs' assignments to the financial institutions were absolute and, consequently, the plaintiffs' assignors had no right to sue. It was argued that only the assignees had the right to sue. The High Court of Kota Kinabalu dismissed the preliminary objection and held that the plaintiffs as assignors could sue because the assignments were not absolute. The High Court of Kota Kinabalu went straight to the heart of the matter and concentrated solely on the issue of whether the assignments there were absolute assignments. It decided that since the assignments were not absolute, then it held that the assignors could therefore sue. At p 811 of the report, the learned judge had this to say:

> The assignment to the financial institutions in the instant case must surely have been by way of charge. The defendants did not produce any document to show otherwise. Thus, I am of the view that the plaintiffs can commence an action without the consent of the financial institutions.

and that was all he said on this point — if there were no absolute assignments, the assignors could sue. With respect, no reason or authority was cited for this proposition. The learned judge assumed that once the assignments were not absolute, the assignors could sue alone. The learned judge too did not consider the other possibility — the possibility that both the parties, namely the assignors and the assignees must be parties to the suit. Again the cases of *Khaw Poh Chhuan v Ng Gaik Peng & Ors*; *Walter & Sullivan, Ltd v J Murphy & Sons Ltd Same v Same* together with the other cases alluded to in the early part of this judgment and the textbook writers whose passages were quoted in verbatim in the early part of this judgment were not brought to the attention of the learned judge. It is germane to mention that the case of the *Three Rivers District Council & Ors v Governor & Company of The Bank of England* which was decided in November 1994 was not brought to the attention of the learned judge even though his Lordship decided the case of *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* in May 1995. This may be due to the fact that the case of the *Three Rivers District Council & Ors v Governor & Company of The Bank of England* was only reported in 1996. Be that as it may, the case of the *Three Rivers District Council & Ors v Governor & Company of The Bank of England* made no new law; it only repeated and vigorously applied well known principles of law. In my judgment, the case of *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* was decided per incurium and being a High Court decision, it was not binding on me. I still preferred the binding decision of the Federal Court in the case of *Khaw Poh Chhuan v Ng Gaik Peng & Ors*.

A final Malaysian case to be considered would be the case of *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 CLJ 211, a decision of the Shah Alam High Court. The plaintiffs in that case purchased an apartment from the defendant developer and assigned the sale and purchase agreement to an associate company of the defendant as security for a loan. The plaintiffs took the matter to court and sued the defendant developer and sought for a declaration that they were no longer bound by the sale and purchase agreement. The defendant objected and raised the point that the plaintiffs have no locus standi to sue. The High Court judge held that the assignment was by way of a charge and ruled that the plaintiffs have a right to sue. At p 214 of the report, the learned judge said:

> Consequently I held that the plaintiffs had the necessary capacity to sue. Whilst there are some parallels between *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 the capacity of the plaintiffs in that case was not challenged.

With respect, the learned judge did not discuss the other possibility alluded to earlier and no reference was made to the cases alluded to earlier. The learned judge referred to the case of *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170, and I must now examine this case. That was a case emanating from the Supreme Court. There the plaintiff purchased a **A** two-storey link house from the second defendant developer at a price of $145,000. The plaintiff then assigned the rights of the sale and purchase agreement to the first defendant bank as security for a loan to purchase the said house. The second defendant developer was late in delivering the said house to the plaintiff. The latter was certainly entitled to claim damages from the second defendant developer. The plaintiff then applied for an **B** injunction to restrain the bank (who had given an undertaking to the second defendant developer to release the loan) from releasing the loan to the developer as payment of the balance of the purchase price because the plaintiff wanted to set off the damages due to the plaintiff for the late delivery against the balance of the purchase price. The Supreme Court **C** granted the injunction on the ground that the plaintiff had only assigned the rights in the sale and purchase agreement to the bank. The Supreme Court held that the plaintiff's obligation to pay the purchase price was never assigned because one assigns rights and not obligations. Therefore, so the Supreme Court held that as the party with the primary obligation to pay, the plaintiff was entitled to tell the bank to stop payment notwithstanding the **D** bank's undertaking.

In my judgment, the case of *Hoo See Sen & Anor v Public Bank Bhd & Anor* can easily be distinguished and highlighted. In that case all the relevant parties were before the court, namely, the assignor, the assignee and the developer. It was indeed an ideal situation where any decision of the court **E** would bind all the relevant parties. In that case too, the question of whether the assignment was absolute or not and whether the assignor, assignee or both of them must be made parties to the action was not an issue at all. In my judgment, the relevancy of that case to the facts of the present appeal would be to show to this court the need to have all the relevant parties to be present before the court so that the court could easily make an order binding **F** on all the relevant parties thereto.

Seen in its correct perspective, the three local Malaysian cases referred to above — *Pak Ki Yau*, *Loh Hoon Loi* and *Hoo See Sen* were decided without the benefit of the relevant authorities that have been considered in this judgment. The Federal Court case of *Khaw Poh Chhuan* in trenchant **G** terms explained that if an assignment was not absolute, then the common law position still prevailed. The common law position insisted that all the parties, including the assignee bank, must be present in court.

The letter from the assignee bank dated 24 July 1999 marked as exh 'A' in encl 8

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I have reproduced this letter in the early part of this judgment. By this letter the assignee bank had no objection to the plaintiff suing the defendant. The defendant did not file any affidavit to dispute this letter. Before the SAR, the plaintiff argued that since the defendant did not file any affidavit to dispute the letter, the defendant must be deemed to have admitted the letter. Mr Soo San San relied on the case of *Ng Hee Thoong & Anor v Public* **I** *Bank Bhd* [1995] 1 MLJ 281, a decision of Gopal Sri Ram JCA where his Lordship at p 286 of the report said:

A

> Now, it is well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

B and using this as a leverage, it was submitted that the defendant was estopped from stating otherwise. Mr Ahmad Moosdeen was quick on the uptake and he submitted that the defendant did not dispute the fact that the assignee bank did give the letter to the plaintiff. That being the case, so he submitted, there was no necessity to file any affidavit to dispute this fact. Indeed there was no necessity to file an affidavit if the defendant agreed that C there was a letter emanating from the assignee bank. Mr Ahmad Moosdeen further submitted that the defendant took exception to the letter especially as to the legal effect of the letter in question. He questioned whether the letter had the legal meaning which the plaintiff sought to ascribe to it. He submitted that the legal effect was a question of law. Indeed it was up to the respective counsel to submit on the legal effect and for the court to decide D on the issue accordingly. It would certainly not be a proper course of action for the defendant to undertake by filing an affidavit to dispute the legal effect of a document since the role of an affidavit is limited to the purpose of deposing to a state of facts and not in regard to a question of law. Order 41 rule 5 of the RHC states as follows:

E

> (1) Subject to O 14 r 2(2) and 4(2), to para (2) of this rule and to any order made under O 38 r 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

F Only the facts must be deposed to in affidavits. The law, especially the construction of the letter in question, remains the domain of the court to reflect and expound. In the words of Mohamed Dzaiddin SCJ in *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 (SC), especially at p 410 of the report:

G

> In our view, the learned judge had taken a wrong approach in arriving at his conclusion that the facility given in the letter of 7 March 1986 was a new facility. We think he had been influenced by the contents of the letter and the admission by the appellant that it was a new facility. It is true the said letter described the facility as a 'renewal of facility'. It may also be true that the appellant had admitted that it had granted to the borrower a new facility of H RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10%pa, and therefore different from the first and second facilities of 9%pa. However, it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is I no longer a question of words but substance (see *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131; and *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513; [1957] 3 All ER 563; [1957] 3 WLR 980).

> *Kingston's Case* (1776) 2 Smith LC (13th Ed) 644 (per De Grey CJ on behalf of the judges summoned to advise the House, at p 644-645). A

But in the present appeal, the assignee bank was not the plaintiff. The assignee bank was not cited as a party at all. There was no material to show that the assignee bank was a privy of the plaintiff. Since the assignee bank was not a privy to the plaintiff, the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* was of no assistance to the plaintiff at all. B

The plaintiff can sue alone because the assignment was not absolute

The defendant's stand was quite simple. If the assignment was not absolute, both the parties, namely, the assignor and the assignee bank must be in court. C

The plaintiff relied heavily on the letter dated 24 July 1999, and argued that there was no need to cite the assignee bank.

With respect, that letter did not carry much weight. It was neither here nor there. A perusal of that letter would show that: D

(1) it did not say that the assignee bank was re-assigning all its rights in the security back to the plaintiff so that the plaintiff would be the sole owner of the rights; and

(2) it did not say with certainty that the assignee bank would not sue or would not enforce its rights in the security. E

But one thing was certain. The letter specifically stated that the 'consent' was subject to the assignee bank's rights remaining intact, namely, the assignee bank could enforce its rights in the usual way: if there was default, the assignee bank could sue or sell the security.

F In the context of the present appeal there was only one assignment. If the assignment complied with s 4(3) of the Civil Law Act 1956, it would be an absolute assignment and only the assignee bank can sue (*Nouvau Mont Dor*'s case). If the assignment can be categorised as an absolute equitable assignment but for other reasons it did not comply with s 4(3) of the Civil Law Act 1956 (for example, it was not in writing), then under the common law the assignee bank may still sue alone as s 4(3) of the Civil Law Act 1956 G had not taken away the rights of the assignee bank in common law (*Khaw Poh Chhuan*'s case). In all other non-absolute assignments, both the parties — assignor and assignee, must be present and be made parties to the action (see HH Treitel in *The Law of Contract*).

Going on an uphill task, the plaintiff's counsel drew my attention to the H case of *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* and he laid stress and emphasised the following passages appearing in the judgment of the learned judge in that case (see pp 810–811 of the report):

> It seems to me that *Nouvau Dor (M) Sdn Bhd v Faber Development Sdn Bhd* had ignored the loan agreement that was executed and that was part of the 'surrounding circumstances' with the result that the aim of the transaction was I totally ignored. Financial institutions are not in the business of buying properties and to construe the transaction in *Nouvau Mont Dor (M) Sdn Bhd*

A of Appeal. In that case the parties signed a document described as a guarantee. This fact was accepted and never disputed by the parties. But the Court of Appeal, after examining the terms of the 'guarantee' held that it was not a guarantee but rather an indemnity. Gopal Sri Ram JCA delivering the judgment of the Court of Appeal at p 147 of the report had this to say:

> B No doubt it is described as a guarantee. But in the construction of contracts the court is not bound by the labels that parties choose to affix onto the particular document. In all such cases the duty of the court is clear. And that duty is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport. As Jenkins LJ observed in *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 at p 528; [1957] 3 All ER 563 at p 570; [1957] 3 WLR 980 at p 991: C
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> > '... the relationship is determined by the law, and not by the label which the parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.'
>
> Although the contract in the present appeal is termed a guarantee by the D parties thereto, the document when read as a whole appeared to me in truth to be an indemnity. When I put this to Encik John during his argument, he readily agreed that the document was indeed an indemnity and not a guarantee. I think that counsel was right in the concession he made. However, since the issue is one of law that relates to the nature of a document, it behoves me to deal with the matter quite independently of any concession of counsel.

E It would be apparent that the defendant did not file any affidavit to deny the letter because the defendant agree that such a letter was given. The plaintiff wanted this court to believe that the defendant had admitted to the validity of the letter. In my judgment, the defendant admitted to the existence of that letter but questioned the legal meaning and effect of that letter. For this F purpose, there was no necessity for the defendant to file an affidavit in reply. This was my judgment and I so hold accordingly.

Res Judicata

The plaintiff argued before the SAR that any decision made by the court G would bind the assignee bank relying solely on the principle of res judicata. The plaintiff argued that there was no fear that the assignee bank would institute another action. Not a single authority was advanced by the plaintiff for this proposition.

By way of a rebuttal, a passage from the judgment of Gopal Sri Ram H JCA in the case of *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590 at p 597 should be referred to. There his Lordship in fine style said:

> The appellant was not a party to the Hipparion proceedings. Neither is he, as a director of Hipparion, its representative in interest. He is therefore a stranger to the Hipparion proceedings. The determination of the issues in those I proceedings did not in any way affect his rights. The proceedings now taken against him to enforce the guarantee are separate and distinct from the Hipparion proceedings. Accordingly, there is no mutuality between the

> parties or interest. Another way of stating the proposition is to say that an estoppel only binds the parties thereto. In the realm of equity, form is irrelevant: it is substance that matters. So it does not matter what form of words are used to state the proposition. The effect is all that matters. A
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> The view we take of the law is supported by the following passage from Spencer Bower and Turner on the *Doctrine of Res Judicata* (2nd Ed) at p 212:
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>> B
>>
>> 'But there may be a type of question which when asked of one litigant as regards A is identical with the same question asked of him as regards B. An example is the construction of a document or a statute as it affects [say] trustees and a beneficiary A, and of the same passage in the same document or statute affecting the same trustees as against beneficiary B, where A and B are mentioned in the document or statute, not by name, but as members of a class between whom no distinction is made. It would C seem here that an interpretation of a document or statute contained in a judgment to which A and not B, is a party, will not bind B, who may thereafter, in other proceedings, contend for a different and more favourable construction as regards himself.'

Now, in the event the plaintiff succeeded in setting aside the SPA, that will D certainly affect the assignment. The assignee bank who was not a party to these proceedings would not be bound and the assignee bank was entitled, on its own, to proceed to another court and seek an interpretation of the SPA that would be favourable to the assignee bank. There would thus be two conflicting decisions on the same SPA which the authorities cited in the early part of this judgment objected to. The only way to avoid this pitfall E would be to cite the assignee bank as a party to the action.

It may be argued that by virtue of the letter dated 24 July 1999 the assignee bank has given to the plaintiff the authority to use the assignee bank's rights to sue the defendant. The answer to this jig-saw puzzle can be seen in the case of the *Three Rivers District Council & Ors v Governor And* F *Company of The Bank of England*. There at p 119 of the report, his Lordship Peter Gibson LJ had this to say:

> An assignor, if the assignment is known, will not be allowed to sue in his own name for himself. He may sue as trustee for the assignee if the assignee so wishes, but in that event he should reveal his representative capacity (RSC, O 6 r 3(1)(a)) and if he attempts to recover for himself, even if, for example, G only part of the debt has been assigned, he will be required to join the assignee.

It must be emphasised that no where in the plaintiff's statement of claim nor in the plaintiff's affidavits did the plaintiff aver that the plaintiff sued also on behalf of the assignee bank. In fact, a perusal of the statement of claim showed that the plaintiff did not even mention the assignment at all. H Order 6 r 3(1)(a) of the RHC states as follows:

> (1) Before a writ is issued it must be indorsed —
>
> (a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues.

I

At this point of time, the writ had not been indorsed to show that the plaintiff sued the defendant in a representative capacity. That being the

A case, it would be ideal for the plaintiff to add the assignee bank as a party to the action.

My attention was drawn to the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 1890 (SC) where the Supreme Court had to deal with two similar causes of action between similar parties B in two different proceedings and the facts may be stated thus. There, the plaintiff took a loan from the defendant to finance the development of a housing project. The plaintiff gave the defendant certain pieces of land as security for the loan. The plaintiff somehow defaulted in repayment and the defendant obtained an order from the land administrator to sell the pieces of land. The plaintiff filed an originating motion to challenge the order for C sale and failed. The same plaintiff then filed another action against the same defendant on the same issue and sought for damages. The defendant applied to strike out the claim on the ground of res judicata. The Supreme Court after reviewing the law on res judicata, allowed the defendant's application because the issue was the same and the parties too were the same in both cases. At pp 197–198 of the report, Peh Swee Chin D FCJ delivering the judgment of the Federal Court in fine language laid down the law:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent E jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action — nemo debet bis vexari pro eadem causa. Both maxims are F the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a res judicata creates an estoppel per rem judicatum, the doctrine of res judicata is really the doctrine of estoppel per rem judicatum, the latter being described sometimes in a rather archaic way as estoppel by record. Since G the two doctrines are the same, it is no longer of any practical importance to say the res judicata is a rule of procedure and that an estoppel per rem judicatum is that of evidence. Such dichotomy is apt to give rise to confusion.
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> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:
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>> 'The plea of res judicata applies, except in special cases, not only to points H upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time'.

Spencer Bower & Turner on the *Doctrine of Res Judicata* (2nd Ed) at p 208 I aptly remarked that:

> A judicial decision inter partes operates as an estoppel, in favour of, and against, parties and privies only, not third persons or strangers (*Duchess of*

> *Kingston's Case* (1776) 2 Smith LC (13th Ed) 644 (per De Grey CJ on behalf of the judges summoned to advise the House, at p 644-645). A

But in the present appeal, the assignee bank was not the plaintiff. The assignee bank was not cited as a party at all. There was no material to show that the assignee bank was a privy of the plaintiff. Since the assignee bank was not a privy to the plaintiff, the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* was of no assistance to the plaintiff at all. B

The plaintiff can sue alone because the assignment was not absolute

The defendant's stand was quite simple. If the assignment was not absolute, both the parties, namely, the assignor and the assignee bank must be in C court.

The plaintiff relied heavily on the letter dated 24 July 1999, and argued that there was no need to cite the assignee bank.

With respect, that letter did not carry much weight. It was neither here nor there. A perusal of that letter would show that: D

(1) it did not say that the assignee bank was re-assigning all its rights in the security back to the plaintiff so that the plaintiff would be the sole owner of the rights; and

(2) it did not say with certainty that the assignee bank would not sue or would not enforce its rights in the security. E

But one thing was certain. The letter specifically stated that the 'consent' was subject to the assignee bank's rights remaining intact, namely, the assignee bank could enforce its rights in the usual way: if there was default, the assignee bank could sue or sell the security.

In the context of the present appeal there was only one assignment. If F the assignment complied with s 4(3) of the Civil Law Act 1956, it would be an absolute assignment and only the assignee bank can sue (*Nouvau Mont Dor's* case). If the assignment can be categorised as an absolute equitable assignment but for other reasons it did not comply with s 4(3) of the Civil Law Act 1956 (for example, it was not in writing), then under the common law the assignee bank may still sue alone as s 4(3) of the Civil Law Act 1956 G had not taken away the rights of the assignee bank in common law (*Khaw Poh Chhuan's* case). In all other non-absolute assignments, both the parties — assignor and assignee, must be present and be made parties to the action (see HH Treitel in *The Law of Contract*).

Going on an uphill task, the plaintiff's counsel drew my attention to the H case of *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* and he laid stress and emphasised the following passages appearing in the judgment of the learned judge in that case (see pp 810–811 of the report):

> It seems to me that *Nouvau Dor (M) Sdn Bhd v Faber Development Sdn Bhd* had ignored the loan agreement that was executed and that was part of the I 'surrounding circumstances' with the result that the aim of the transaction was totally ignored. Financial institutions are not in the business of buying properties and to construe the transaction in *Nouvau Mont Dor (M) Sdn Bhd*

> *v Faber Development Sdn Bhd* as an absolute assignment has that effect. Such a transaction, that is an assignment of property to a financial institution not by way of charge, is not sanctioned under the Banking and Financial Institutions Act 1989 since such assignment, which is not regarded as by way of a charge, would result in the financial institution being engaged in the business of buying and selling property which is not something that the Banking and Financial Institutions Act 1989 allows any financial institution to do. There is still another unreasonable result of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* and it is this. Every purchaser of property, who obtains a loan from a financial institution and who, because of the unavailability of an individual title to the property, employs the instruments of a loan agreement and assignment which the court says is an absolute assignment and not by way of charge, would be that the purchaser would have to declare a disposal and the bank to declare an acquisition of an asset under the Real Property Gains Tax Act 1976. Similar declarations would have to be made conversely when the individual title to the property is thereafter issued and the purchaser becomes registered as the owner because this can only take place after the financial institution had either re-assigned or disposed the property back to the purchaser. Surely, that was not the aim of the transaction. The whole transaction involves a loan from the financial institution to the purchaser to enable the purchaser to purchase the property and the loan agreement and assignment was for the purpose of securing the loan. Notwithstanding the language used, surely that was the aim of the whole transaction and the assignment was purely for the purpose of securing the loan and hence the assignment must be by way of a charge. The loan agreement referred to in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* should not have been ignored. I would prefer to follow the principles of law stated in *Lewison on Interpretation of Contracts*, at p 44, para 2.10, supra, which seems to have been, though not specifically, the position adopted in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 AMR 929 at p 941 where it was said:
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>> 'Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration.'
>
> The assignment to the financial institutions in the instant case must surely have been by way of charge. The defendants did not produce any document to show otherwise. Thus, I am of the view that the plaintiffs can commence an action without the consent of the financial institutions.

It would appear that the above passages criticised the judgment of the Federal Court in the case of *Nouvau Mont Dor*. I must respond and I have this say:

(1) In *Nouvau Mont Dor*, the simple facts were that the plaintiff took a loan from a bank to purchase a shop house and assigned the rights in the sale and purchase agreement (the chose in action) to the bank as security for the loan. These set of facts were not in dispute at all.

(2) The Federal Court in *Nouvau Mont Dor* held that the assignment was absolute and not by way of a charge and was in compliance with s 4(3) of the Civil Law Act 1956 and so the plaintiff as the assignor had no right to sue, only the assignee bank could sue.

(3) The learned judge in *Loh Hoon Loi* appeared to adopt the view that since it was not disputed that the whole transaction was a loan transaction and the assignment was meant to be a security, it was wrong to say that the assignment was absolute and not by way of a charge. A

(4) The learned judge in *Loh Hooi Loi* held the view that if the assignment was held to be not by way of a charge, then in effect the bank was buying the property. This according to the learned judge cannot be the normal business of a bank and the bank would then contravene the Banking and Financial Institutions Act 1989 while the parties will have to comply with the Real Property Gains Tax Act 1976 which was meant only for genuine sale and purchases. B

(5) With respect, the mistake in the reasoning of the learned judge in *Loh Hoon Loi* was that the learned judge assumed that an assignment given as security for a loan can never be an absolute assignment within the meaning of s 4(3) of the Civil Law Act 1956 but must be by way of a charge, since this was a security for a loan. C

(6) With respect, the nagging problem of whether a security for a loan can be absolute was addressed, ventilated and resolved long ago in the case of *Tancred & Ors v Delagoa Bay & East Africa Railway Co* (1889) 23 QBD 239 which was affirmed by *Durham Brothers v Robertson* (1898) 1 QB 765 and other related and subsequent cases. The facts of *Tancred* may be stated as follows. *Tancred* took a loan of 3000 pounds from Messrs. Goslings & Sharpe and as security assigned to the latter by way of a mortgage a debt of 5000 pounds owing by the defendant to *Tancred*. When *Tancred* and Messrs Goslings & Sharpe sued the defendant, the defendant vehemently said that Messrs Goslings & Sharpe was not an assignee. The court held that the assignment was absolute under s 25(6) of the English Judicature Act 1873 (similar to our s 4(3) of the Civil Law Act 1956) and not by way of a charge and the court held that Messrs. Goslings & Sharpe as absolute assignee could sue alone. D E F

(7) (a) It is germane to note that in the case of Tancred & Ors v Delagoa Bay And East Africa Railway Co, it was not disputed that the assignment was given as security for a loan — similar to that of Nouvau Mont Dor and Loh Hoon Loi. Yet, the court in Tancred held that the assignment was absolute and not by way of a charge. G

(b) It can safely be said that as long ago as 1889, the English court in *Tancred* has held that one can have an absolute assignment and not by way of a charge even if the assignment was actually a security for a loan and nothing else. H

(8) The Court of Appeal in *Durham Brothers* addressed the point directly. In that case, the plaintiff gave certain advances to a firm of contractors. As security for those advances, the contractors gave to the plaintiff a mortgage of a debt owing by the defendant to the contractors. The mortgage as drafted showed that the contractors 'assigned our interest in the above-mentioned sum until the money I

with added interest was repaid to you' and because of the wording of the mortgage, the court held that the assignment was not absolute. In the course of judgment, Chitty LJ posed a question: whether it was possible to have an absolute assignment if the assignment was a security for a loan? This was, incidentally, the very same question that troubled the learned judge in *Loh Hoon Loi.* Chitty LJ answered the question in the affirmative, so long as the wording of the assignment (the security document) clearly said so (see pp 771–772 of the report which had been reproduced in the early part of this judgment).

(9) It can be said that if the rights in the security — any chose in action, be it a debt or the rights in a sale and purchase agreement were to be given absolutely without any reservation to the assignee and not by way of a charge — where the advances had to be repaid, that kind of assignment was an absolute assignment even if the rights were given as a security for a loan. On repayment of the loan, equity would insist that the rights be returned to the assignor by way of a re-assignment and for this purpose notice must be given to the debtor. If this be the law, then the debtor will have no doubts or uncertainty. When the debtor was given notice of the absolute assignment, the debtor would have no doubt at all. All the rights would be with the assignee and not with the assignor. In a situation where the debtor was given notice of the re-assignment, the debtor would again have no doubts as the rights would have reverted back to the assignor. Until the debtor received the notice of re-assignment, the debtor would have no uncertainty as to where the rights should go because at that stage the rights would lie with the assignee. It must be stressed that *Durham Brothers* was vigorously applied in *Nouvau Mont Dor.*

(10) The problem arose for the debtor when the assignment was said not to be absolute. In such a case, the debtor would not know where the rights would be — whether it would be with the assignor or with the assignee. It was for this reason that the courts have always insisted that both the assignor and the assignee to be cited as parties so that the courts could adjudicate and determine the matter expeditiously in order to bind the parties.

In my judgment, all these facts formed the analysis of *Tancred* and *Durham Brothers* cases. That being the case, it must be resolved that:

(a) there can certainly be an absolute assignment of a security for a loan if the wording of the security document (referring to the assignment itself) showed that it was to be absolute, even though the security was for a loan.

(b) this approach certainly would not make the assignee (for instance like the bank in *Nouvau Mont Dor* or the financial institutions in *Loh Hoon Loi*) to be a purchaser of rights or properties because they would be required by equity to re-assign the rights back to the assignor on repayment with the relevant notice to the debtor or the developer, as the case may be.

(c) as such, the Banking and Financial Institutions Act 1989 and the Real Property Gains Tax Act 1976 are not invoked as they are not involved at all.

(11) To me, the terms of the assignment or security document in *Nouvau Mont Dor* showed that the assignment was absolute. That being the case, only the assignee could sue until the rights were re-assigned back to the assignor with notice to the debtor developer. The terms of the assignment or security document in *Loh Hoon Loi* showed that the assignment, and as held by the court, to be not absolute. But that can never make the decision of the Federal Court in *Nouvau Mont Dor* to be any less sound.

(12) Since the case of *Loh Hoon Loi* held that the assignment was not absolute, the crucial question to pose would be: who then can sue? *Loh Hoon Loi* gave the answer and it held that the assignor alone can sue without giving any reasons or support it with authorities. The array of cases which were referred to in the early part of this judgment clearly showed that both the assignor and the assignee bank must sue; and this must be law that should guide this court.

Entering an unconditional appearance and the filing of defence

An argument was advanced that since the defendant had entered an unconditional appearance and filed the defence, the defendant was not entitled to apply to strike out the plaintiff's claim on the ground of estoppel or waiver.

In rebuttal, the defendant argued that the argument was misconceived. The defendant did not dispute the fact that it had entered an unconditional appearance and filed its defence accordingly.

In *The 'Avro International'; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147 (CA), the defendants there had entered an unconditional appearance and sought by way of an application to strike out the claims on the ground that the Singapore courts had no jurisdiction to adjudicate the claims. The Singapore Court of Appeal dismissed the application on the ground that since the defendants had entered unconditional appearance, they have submitted to the jurisdiction of the Singapore courts. It was further held that if the defendants had wanted to challenge the jurisdiction of the Singapore courts to hear the claims, the defendants should have entered conditional appearance. At p 149 of the report, the judge said:

> The effect of entering an unconditional appearance is two fold: (1) it waives any irregularity of the writ or its service; and (2) the defendant is considered to have submitted to the jurisdiction of the court: see Vol 1 *The White Book* (1979 Ed) paras 12/1/3. A defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance.

Malek Ahmad J (now FCJ) in *EG Tan & Co (Pte) (in liquidation) v Tan Chong San* [1993] 1 MLJ 256 echoed the same sentiments. At p 262 of the report, his Lordship said:

> *Mallal's Supreme Court Practice* (2nd Ed) vol 1 at p 68 had pointed out that the effect of an unconditional appearance is a waiver of any irregularity there may be and a submission to the jurisdiction of the court as per *Sheldon v Brown Bayley's Steelworks Ltd & Anor* [1953] 2 All ER 894 but it is not a waiver where the service is a nullity as per *KMNSPN Valliammai Achi v ARS Nachiappa Chettiar* [1957] MLJ 27 which is of course not applicable in this case. In the *'Avro International'; 'The Avro Venture'; 'Avro International' (Owners of) v Arabian Marine Bunkers Sales Co Ltd & Anor* [1988] 1 MLJ 147, the Court of Appeal in Singapore decided that the effect of entering an unconditional appearance is two fold, that is, it waives any irregularity of the writ or its service and that the defendant is considered to have submitted to the jurisdiction of the court. They further held that a defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance and that in their case, the appellants' unconditional appearances were fatal to their right to object to jurisdiction. To my mind, the same ruling would apply in this case.

In *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83, Idris Yusoff J at p 87 of the report remarked:

> The plaintiff, on the other hand, argues that by filing an unconditional appearance to the suit, the defendant is precluded from raising this ground anymore. I must say with respect that I entirely agree with the plaintiff's contention as the law on this point is well settled. A host of authorities show that if the defendant is mindful of challenging the jurisdiction of the court he is to enter a conditional appearance as opposed to an unconditional one, which would be followed by some form of application to have the suit set aside. The method adopted by the defendant in this case is clearly tantamount to a submission to the jurisdiction of the court.

All these three cases concerned defendants entering unconditional appearances and then applying to strike out the claims on the ground that the courts had no jurisdiction to hear the claims. The courts in these three cases held that once a defendant enters an unconditional appearance, he is deemed to have waived any irregularity in the writ and its service thereof and to have submitted to the jurisdiction of the court.

Now, the crucial question to pose would be: If the defendant wants to strike out the claim on other grounds, must the defendant enter a conditional appearance or can the defendant enter an unconditional appearance? In *Tengku Jaafar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156, the court held that where a defendant was not challenging the validity of the writ or service thereof, it was not necessary for him to file a conditional appearance. That was a case where the plaintiff sued the defendant for defamation. The defendant had entered an unconditional appearance and then applied to strike out the claim on the ground that the plaintiff lacked the necessary locus standi to sue. On the other end of the fence, the plaintiff objected to the application and submitted that the defendant had entered an unconditional appearance and therefore had waived the right to strike out. The learned judge dismissed the plaintiff's objection and allowed the defendant's application. At pp 165–166 of the report, the learned judge in the person of Idris Yusoff J aptly said:

> One last submission advanced by counsel for the plaintiff is that if the defendant chooses, as he does in his application, to strike out the writ of summons and the statement of claim, he should have filed a conditional appearance; now that he has put in an unconditional appearance, he is therefore barred from proceeding with the said application.
>
> The effect of conditional appearance is fully explained in Mallal's Supreme Court Practice (2nd Ed) at para 12/1/3. Such an appearance reserves to the defendant 'the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid'. The position in the instant case is different — the defendant is not challenging the validity of the writ or service thereof but proceeds on the premise that the plaintiff has no locus standi to bring the said suit against him, the suit is clearly scandalous, frivolous, vexatious and/or an abuse of the process of the court as the alleged publication does not amount to defamation or sedition — the allegations do not evince any cause of action against him. In the circumstances I am satisfied that the course of action taken by the defendant is in line with O 18 r 19 of the RHC and that the application is made promptly, ie before service of the statement of defence on the plaintiff.

It is opportune to reproduce O 18 r 19(1) of the RHC. It states as follows:

> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

I must emphasise the phrase 'at any stage of the proceedings' and it must necessarily mean that a party can make the application at any time up to the close of pleadings and, in special circumstances, even after the close of pleadings (see the speech of Zakaria Yatim J (as he then was) in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman and another action* [1987] 2 MLJ 633 particularly at p 635 of the report). Now, since a party can generally make the application at any time up to the close of pleadings stage, this must necessarily mean after filing an unconditional appearance or a conditional appearance which has become unconditional since the defence, replies, counterclaims are filed only after an unconditional appearance or a conditional appearance which has become unconditional, is entered. The law may compendiously be stated in the following terms:

(1) If a party is interested in striking out a writ on the ground that the writ or service is irregular or of want of jurisdiction, the party must enter a conditional appearance. If the party enters an unconditional appearance, the party is deemed to have waived any irregularity in the writ or service and is said to have submitted to the jurisdiction of the court because this is the main effect of entering an unconditional appearance.

(2) If a party is interested to strike out a writ and the statement of claim on other grounds, the party can enter an unconditional appearance because the effect of an unconditional appearance (be it for defective writ or for defective service thereof or for want of jurisdiction) will not be relevant to the main ground for the striking out application.

(3) All the cases and commentaries show that a party can apply to strike out right up to the close of the pleading stage.

(4) Factually speaking, the plaintiff knew, at all material times, that the defendant had entered an unconditional appearance. That unconditional appearance too had been served on the plaintiff. Thus, when the defendant filed encl 7 to strike out the plaintiff's claim, the plaintiff should have raised a preliminary objection that the unconditional appearance was an irregularity. The plaintiff simply did not raise that kind of preliminary objection but instead proceeded to file an affidavit in reply in encl 8 and went at great length in submitting before the SAR. The plaintiff only raised this technical point at this stage and, that being the case, the plaintiff must be construed to have waived the irregularity, if at all that irregularity existed. Peh Swee Chin FCJ in *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 at p 480 had this to say:

> A person cannot approbate and reprobate, so that if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be only useful if the service had been good, the said irregularity is waived. See also *Rein v Stein* (1892) 1 QB 753 and *Boyle v Sacker* (1888) 39 Ch D 249. We are in entire agreement with the decision in *Fry v Moore*. The second defendant had asked for leave to file an appearance and to file a statement of defence, clearly indicating that he wanted to go into the fray in full swing and that the matter of irregular service was a matter of the past; no longer an issue.

The same point was also ventilated in the case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715.

Conclusion

I must revert to the case of the *Three Rivers District Council & Ors v Governor & Company of The Bank of England* where the English Court of Appeal was very magnanimous and stayed the action until the assignee was make a party to the action. I too must be magnanimous in the interest of justice.

For the reasons adumbrated above, I allowed the appeal in encl 9 and varied the order of the SAR to this extent: the suit is stayed for a period of six months from today (23 May 2000) so as to allow the plaintiff to amend the action by including the assignee bank as a party to the action; failing which, the plaintiff's suit will be struck off. There be no order as to costs.

Appeal allowed, suit stayed for six months to allow the plaintiff to include the assignee bank as a party to the action.

Reportmed by Moy Saw Han